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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

H & D, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

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No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

H & D, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Whether an impasse in collective bargaining negotiations is an "unusual circumstance" that justifies an employer's unilateral withdrawal from a multi-employer bargaining unit.

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is not yet officially reported. The Board's decision and order (App. C, *infra*, 11a-53a) are reported at 240 N.L.R.B. 1315.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1980. The Board's timely petition for rehearing was denied on December 11, 1980 (App. B, *infra*, 10a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) * * *.
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to

wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

STATEMENT

1. H & D, Inc. is a Washington corporation engaged in the manufacture of aluminum doors and windows. For several years, it and two other employers—Bel-Window and Herzog Aluminum Co.—bargained jointly with Ironworkers Shopmen Local No. 506 (the Union), which represented their metal fabricating employees. App. C, *infra*, 12a, 14a.

In January 1977, the Union notified the three employers that it desired to negotiate a new contract to succeed the agreement that was to expire later that year. Seven bargaining sessions were held between February 22 and April 20, without reaching agreement on the terms of a new contract. On April 25, a third employer proposal was rejected by the Union membership, whereupon the Union called a strike and commenced picketing. App. A, *infra*, 2a-3a.[1]

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[1] Two earlier employer proposals were rejected by the employees on April 2 and 14. After the April 2 rejection, the H & D employees submitted resignations from the Union and filed a petition to decertify the Union as their representative with the Board. The petition was dismissed on the ground that it was limited to H & D, whereas the bargaining unit consisted of H & D and the two other employers. App. C, *infra*, 28a-29a, 32a-33a.

At the beginning of May, the Union proposed resubmitting the contract, rejected by the employees on April 25, for a vote on May 3. The reconsideration vote was scheduled but then cancelled. The general manager of H & D notified the Union by letter dated May 2 that a bargaining impasse had been reached, and that because of the impasse H & D was withdrawing from the contract negotiations. App. A, *infra*, 3a.

2. Upon charges filed by the Union, the Board found that H & D was a member of an established multiemployer unit, and concluded that H & D violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain in that unit. In so concluding the Board, applying the principles formulated in *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958),[2] found that H & D's withdrawal from the multiemployer unit was untimely since it occurred after the commencement of contract negotiations. The Board rejected H & D's contention that there were "unusual circumstances" which nonetheless privileged its withdrawal—*i.e.*, an impasse existed in the negotiations, and a majority of H & D's employees had resigned from the Union. The Board found that the evidence did not establish that an impasse existed.[3] The Board also held that the resig-

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[2] In *Retail Associates*, the Board held that an employer is free to withdraw from a multiemployer unit for any reason prior to the date set for renegotiation of the existing contract or the date on which negotiations actually commence, provided adequate notice is given. Once negotiations towards a new contract have begun, however, a party may withdraw only if "mutual consent" is given or if "unusual circumstances" exist.

[3] However, even had an impasse existed, it would not, in the Board's view, have constituted an "unusual circumstance" justifying an otherwise untimely withdrawal from

nation of H & D's employees from the Union would not relieve H & D of its obligation to bargain in the multiemployer unit, for it did not establish that the Union had lost its majority employee support in the remainder of the unit. The Board ordered H & D to bargain with the Union as the representative of its employees in the established multiemployer unit. App. C, *infra*, 11a-18a.

3. The court of appeals found, contrary to the Board, that a bargaining impasse did exist at the time of H & D's withdrawal from the multiemployer unit. The court, following its earlier decisions,[4] then held, contrary to Board precedent (note 3, *supra*), that an impasse is an "unusual circumstance" that justifies an employer's otherwise untimely withdrawal from a multiemployer unit. The court accordingly denied enforcement of the Board's order. App. A, *infra*, 6a, 9a.

REASONS FOR GRANTING THE PETITION

The question whether an impasse in bargaining negotiations is an "unusual circumstance" that justifies an employer in unilaterally withdrawing from multiemployer bargaining unit is also presented in *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, No. 80-931.

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a multiemployer unit. *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22 (1973), enforcement denied, 500 F.2d 181 (5th Cir. 1974). The Board has recently reaffirmed that position. *Charles D. Bonanno Linen Service, Inc.*, 243 N.L.R.B. No. 140 (1979), enforced, 630 F.2d 25 (1st Cir. 1980), petition for cert. pending, No. 80-931.

[4] *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir.), cert. denied, 423 U.S. 893 (1975); *Authorized Air Conditioning Co.* v. *NLRB*, 606 F.2d 899, 907 (9th Cir. 1979).

We have acquiesced in the petition in that case because of the importance of the question and the conflict among the circuits, compare *Charles D. Bonanno Linen Service, Inc., supra,* and *NLRB* v. *Marine Machine Works, Inc.*, No. 79-3938 (5th Cir. Jan. 30, 1981), with the instant case, *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975), and *NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978), cert. denied, 439 U.S. 1130 (1979). The same considerations support this petition.

CONCLUSION

Consideration of this petition should be deferred pending this Court's decision in No. 80-931, and the petition should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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MARCH 1981

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7198

H & D, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

October 8, 1980

Before: KILKENNY and SNEED, Circuit Judges, and CALLISTER,* District Judge

OPINION

CALLISTER, District Judge:

Pursuant to 29 U.S.C. §§ 160(e) and (f), H & D, Inc., has petitioned for review of a National Labor Relations Board decision and order which set aside a favorable decision of an administrative law judge, and found that it had committed an unfair labor practice under section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1)

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* Honorable Marion J. Callister, United States District Judge, District of Idaho, sitting by designation.

and (5) 1976 by withdrawing from a multiemployer bargaining unit during the course of collective bargaining. The NLRB cross-applies for enforcement of its order requiring H & D, Inc., to resume bargaining with the multiemployer unit. We grant the petitioner's application for review and direct that the NLRB's cross-application for enforcement of its order be denied.

BACKGROUND:

H & D, Inc., is a Washington corporation engaged in the manufacture of aluminum doors and windows. For the time period preceding the dispute which gave rise to this case, the Ironworkers Shopmen Local Union No. 506 served as the collective bargaining representative for about one half of H & D production employees. As a general practice in prior contract negotiations with the union, H & D would bargain jointly with two other employers, Bel-Window and Herzog Aluminum Co., even though there was no duly organized employer's bargaining unit, nor any formal bargaining agreement.

The negotiations which gave rise to this action began in early 1977 when the union sent out reopening letters and contract proposals to H & D, Bel-Window, and Herzog Aluminum for a contract to succeed the agreement that was to expire later that year. Between the first bargaining session on February 22 and April 20, seven bargaining sessions were held without substantial agreement as to the terms of the new contract. Two employer proposals were decisively rejected by the union members. On April 25, a third employer's proposal was submitted to the union membership for ratification but was defeated by a vote of 28 to 14. The union then

unanimously elected to strike and commenced picketing two days later.

During the negotiations for a new contract, the H & D employee union members met several times to discuss their dissatisfaction with their union representation. When an employer proposal was rejected on April 2, almost all of the H & D employees submitted written resignations from the union and attempted to file a decertification petition with the NLRB. The decertification petition was apparently procedurally defective and was later withdrawn by the employees. None of H & D's employees participated in the strike authorized by the April 25 vote.

On April 18, H & D asked to withdraw from negotiations because of its employees' resignation from the union, but the union would not consent. At the beginning of May, several days after the strike began, the union proposed resubmitting the contract, rejected by the rank-and-file on April 25, for a vote on May 3. The reconsideration vote was scheduled but then cancelled. The general manager of H & D notified the union by a letter dated May 3 that a bargaining impasse had been reached when the union suggested a second vote on a prior proposal which had been turned down by the membership, and because of the impasse they were withdrawing from the contract negotiations.

The union subsequently filed charges against H & D for refusing to bargain as part of the multiemployer group, and a hearing was had before the administrative law judge on August 18, 1977. The administrative law judge found that H & D had not committed an unfair labor practice by withdrawing from the joint negotiations because there was no multiemployer bargaining unit as defined by the National Labor Relations Board decision. *Finding of Fact and*

Conclusions of Law of Administrative Law Judge Sahm, October 3, 1978, at 9.[1] The administrative law judge did not make a finding concerning an impasse in negotiation because of the NLRB's decision in *NLRB* v. *Hi-Way Billboard, Inc.*, 206 N.L.R.B. 22 (1973), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974) where the Board indicated that even a genuine impasse did not create an "unusual circumstance" allowing the unilateral withdrawal of an employer from bargaining. Nor did the administrative law judge address H & D's contention that the en masse resignation of its employees from the union created an "unusual circumstance" justifying withdrawal from negotiations.

On review before the NLRB the Board rejected the administrative law judge's conclusion that there was no multiemployer bargaining unit at the time of H & D's withdrawal, but instead found that based on the controlling history of the collective bargaining an employer bargaining unit did exist. Addressing the contention that the bargaining impasse created an "unusual circumstance" justifying H & D's withdrawal, the Board summarily concluded "that the evidence does not establish that an impasse existed . . . ." *H & D, Inc.*, 240 N.L.R.B. No. 161, p.3 (1979). Finally, the Board concluded that the resignation of H & D's employees from the union did not

[1] The original case heard before the administrative law judge included three respondents, H & D, Inc., Herzog Aluminum Co., and Bel-Window Division of Belknap Glass Co. Prior to the August hearing the complaint against Herzog was dismissed. The administrative law judge found that Bel-Window did not commit an unfair labor practice because they did not withdraw from negotiation, and the Board sustained those findings. Thus neither Bel-Window nor Herzog are parties in this appeal.

create an "unusual circumstance" allowing its withdrawal.

H & D seeks review of the Board's findings contending that the determination that there was no impasse and that a multiemployer bargaining unit existed at the time of its withdrawal from negotiations was not supported by substantial evidence, and that the resignation en masse of H & D's employees was an "unusual circumstance" exculpating H & D's withdrawal.

Impasse

An employer who engages in collective bargaining as part of a multiemployer unit commits an unfair labor practice by withdrawing from the unit after bargaining has commenced without the consent of the opposing party, absent "unusual circumstances." *See NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d 230, 232 (9th Cir. 1975), *cert. denied* 423 U.S. 893 (1975); *NLRB* v. *Brotherhood of Teamsters etc., Local No. 70*, 470 F.2d 509 (9th Cir. 1972), *cert. denied* 414 U.S. 821 (1973); *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958). Based on the letter of May 3, 1977, from the general manager of H & D, it is undisputed that H & D withdrew from negotiations after bargaining had begun without the consent of the union. H & D contends, however, that its withdrawal was excused because of "unusual circumstances," viz., an impasse had been reached in the negotiations.

It should be noted that the Board has steadfastly maintained in its rulings on the subject that a bargaining impasse does not meet the requirements of an "unusual circumstance" as established by *Retail Associates, supra*, permitting withdrawal from a multi-

employer group. *See, Hi-Way Billboard, Inc., supra.* Numerous circuit courts of appeals have rejected this position of the NLRB. Recently, this court declared in *Authorized Air Conditioning* v. *NLRB*, 606 F.2d 899 (9th Cir. 1979), citing cases from the Second, Third, Fifth, Eighth and Ninth Circuits that "[t]he Courts of Appeals have consistently recognized an impasse in negotiations as justification for a unilateral withdrawal from a multi-employer unit." 606 F.2d at 907. While the Board argues on this appeal that its position, considering the competing policy considerations, is compelling and entitled to judicial acceptance, and that in recent cases the courts' misconceptions of the Board's rulings have been clarified, these contentions are not persuasive and appear to be disposed of in *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir. 1975), and *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3rd Cir. 1975). We find no cogent reason at this time to challenge the position taken by this court in *Authorized Air Conditioning Co.* v. *NLRB, supra.*

Thus, we are left to turn to the record to determine if the Board's finding that there was no impasse can be sustained. This court acknowledges the long-standing standard of review for factual findings of the NLRB is they must be sustained "if supported by substantial evidence on the record considered as a whole . . . ." 29 U.S.C. §§ 160(e), (f), *see, Universal Camera Corp.* v. *NLRB*, 340 U.S. 474.

A bargaining impasse has been described as a situation where the "members could well conclude that 'there was no realistic prospect that continuation of discussion at that time would have been fruitful' . . . . [citations omitted]." *NLRB* v. *Independent Ass'n of Steel Fabricators*, 582 F.2d 135, 147 (2nd Cir.

1978). A number of relevant criteria have been identified in determining whether an impasse exists. *See* MURPHY, *Impasse and the Duty to Bargain in Good Faith*, 39 Univ. Pitt. L. Rev. 1, 6-16 (1977). The NLRB has recognized a number of these criteria:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), *enforced sub nom. American Fed. of Television & Radio Artists* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

Negotiations on a new contract began one month before the effective termination date of the old agreement. In the ensuing three months until H & D officially withdrew from the bargaining, seven bargaining sessions were held and three employer proposals were referred to and rejected by the union membership. The record manifests a continuing disagreement on the central issue of the economic aspects of the contract, i.e., wages, health and pension benefits.[2] The administrative law judge in-

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[2] Raymond Glidden, a union negotiator, testified that these issues were the center of dispute at most of the bargaining sessions. When questioned about the April 20 session, which was the last meeting before H & D's withdrawal, he responded:

> "Q. And what were the proposals exchanged at this meeting? Well, what were the areas of difference, put it that way, the areas in controversy?

dicated in his opinion that "the parties had been 'deadlocked' on the monetary proposals since shortly after negotiations for a new contract had begun and still continued as of the date this trial commenced on August 18." *Findings of Fact and Conclusions of Law of Administrative Law Judge Sahm, supra,* at 14.

The record also reveals that shortly after H & D requested permission to withdraw from the bargaining group but prior to their unilateral withdrawal, the union, after voting to strike and without further concessions, offered to resubmit an employer's proposal for a vote. While this offer could have indicated some willingness by the union to change its position, the contention appears manifestly unlikely considering that the exact same proposal had been rejected by a 2 to 1 margin a week earlier, and the proposed vote was subsequently cancelled. The H & D employees became upset with the union's strike authorization, resigned from the Union, and continued to work even after a strike was called. Finally, H & D's withdrawal from the multiemployer bargaining unit did not occur until after the strike had commenced.

The subsequent history of bargaining between the remaining employers, while not dispositive of the question of a deadlock, supports H & D's contention that at the time it withdrew negotiations were at an impasse. The union continued its strike and met

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A. Well, again, we go back to the wages and the health and welfare plan and the dental plan and the pension.

Judge Sahm: They never agreed on those at any time; is that correct, the three you just mentioned?

The Witness: Yes."

Record at 71.

several times with the employers to work out an agreement; however, at the time of the hearing before the administrative law judge the parties had still not reached a resolution on the economic issues and did not appear to be willing to make any further concessions.

From the foregoing review of the record, we cannot accept the Board's cryptic conclusion that the evidence does not establish that an impasse existed. On the contrary, the evidence presented in the record establishes a negotiating impasse at the time of H & D's withdrawal from the multiemployer bargaining unit.

Due to our determination that H & D was justified in withdrawing from the multiemployer bargaining unit because of an impasse in negotiations, it is unnecessary to reach the question of whether there was substantial evidence to support the Board's finding that there was a multiemployer bargaining unit, nor is it expedient to address the problem of whether the en masse resignation of H & D's employees from the union was an "unusual circumstance" permitting employer withdrawal.

The petition for review of H & D, Inc., is hereby GRANTED; and the Board's cross-application for enforcement of its order will be DENIED.

SO ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7198

H & D, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

December 11, 1980

Before: KILKENNY and SNEED, Circuit Judges, and CALLISTER *, District Judge

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Marion J. Callister, United States District Judge for the District of Idaho, sitting by designation.

APPENDIX C

240 NLRB No. 161

FJM

D-4792
Seattle, Everett, and
Woodinville, Wash.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 19-CA-9460

BEL-WINDOW, DIVISION OF
BELKNAP GLASS COMPANY

and

IRON WORKERS SHOPMEN LOCAL UNION NO. 506, AFFILIATED WITH BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS INTERNATIONAL UNION, AFL-CIO

Case 19-CA-9462

H & D, INC.

and

IRON WORKERS SHOPMEN LOCAL UNION NO. 506, AFFILIATED WITH BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On October 3, 1978, Administrative Law Judge Henry S. Sahm issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief; Respondent H & D,

Inc., filed a cross-exception, a supporting brief, and an answering brief; and Respondent Bel-Window filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith.

The Administrative Law Judge concluded that Respondents and another employer did not form a multiemployer bargaining unit. He also found that, assuming the existence of a multiemployer group, Respondents' conduct did not violate Section 8(a)(5) and (1) of the Act. We agree with the Administrative Law Judge's finding that Respondent Bel-Window never refused to bargain with the Union and therefore did not violate the Act as alleged.

We disagree, however, with his recommended dismissal of the complaint against Respondent H & D, and find for reasons set forth below that H & D's refusal to engage in joint negotiations violated Section 8(a)(5) and (1) of the Act.

Contrary to the Administrative Law Judge, we find that the evidence establishes the existence of a multiemployer bargaining unit. During the past 10 years Bel-Window, H & D, and various other employers jointly negotiated several collective-bargaining agreements with the Union. In practice, the Union—Local 506—initiated negotiations by sending a standard reopening letter to each of the employers. The employers also received identical contract proposals from the Union. Each employer in the group was individually represented at the bargaining sessions, but upon receiving a proposal from the Union, the employers' representatives caucused and jointly

formulated one counterproposal. When contract proposals were submitted to the employees for ratification one vote was conducted, with employees of all in the group voting as a unit. After ratification the employers signed separate contracts that were identical except for the employer's name. Consequently, we agree with the General Counsel's contention that Respondents' past bargaining practice indicated that each employer intended to be bound by the results of group negotiation rather than by individual bargaining, and thus that the multiemployer bargaining unit existed at times relevant. We next consider General Counsel's allegation that Respondent H & D unlawfully refused to bargain as part of that unit.

After multiemployer negotiations began in early 1977, H & D informed the Union on two occasions that it would not bargain jointly with the other two employers as part of the multiemployer unit. H & D argues that its withdrawal from joint bargaining, though it normally would be untimely under applicable Board precedent,[1] was privileged due to the parties' having reached a bargaining impasse and the fact that a majority of its employees had resigned from Local 506 and joined another union.

H & D excepts to the Administrative Law Judge's analysis of the legal consequences of an impasse in negotiations between a union and a multiemployer unit. However, we find that the evidence does not establish that an impasse existed and, therefore, the consequences of such an impasse are immaterial. With respect to the claim that H & D's employees had resigned from Local 506, that would not relieve H & D of its obligation to bargain with the Union as to the appropriate unit—the multiemployer unit—or justify an untimely withdrawal therefrom; the test of the obligation in this case is whether the Union

[1] *Retail Associates, Inc.*, 120 NLRB 388 (1958).

represents a majority of employees in the multiemployer unit as a whole. *Sheridan Creations, Inc.*, 148 NLRB 1503, 1505-06 (1964), and cases cited in fn. 9 thereof.

Consequently, as indicated above, we find, contrary to the Administrative Law Judge, that H & D, by refusing on and after May 3, 1977, to bargain as part of the established multiemployer unit, violated Section 8(a)(5) and (1) of the Act. We agree with the Administrative Law Judge that Bel-Window did not withdraw from the multiemployer unit or refuse to bargain with the Union. We affirm his dismissal of the complaint as to Bel-Window.

Amended Conclusions of Law

Substitute the following for paragraph 3 of the Administrative Law Judge's Conclusions of Law:

"3. All production and maintenance employees engaged in the fabrication of metal products employed by Bel-Window, Division of Belknap Glass Company, Seattle, Washington; H & D, Inc., Everett, Washington; and Herzog Aluminum Company, Inc., Woodinville, Washington, constitute a unit appropriate for the purposes of collective bargaining with the meanmeaning of Section 9(b) of the Act.

"4. By refusing to bargain with the Union on and after May 3, 1977, with respect to the wages, hours, and other terms and conditions of employment of the employees in the above appropriate unit, Respondent H & D, Inc., has violated Section 8(a)(5) and (1) of the Act.

"5. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

"6. Respondent Bel-Window, division of Belkrap Glass Company, did not engage in conduct in violation of the Act."

The Remedy

Having found that Respondent H & D, Inc., has engaged in, and is engaging in, an unfair labor practice, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, H & D, Inc., Everett, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Iron Workers Shopmen Local Union No. 506, affiliated with Bridge, Structural & Ornamental Iron Workers International Union, AFL-CIO, with respect to wages, hours, and other terms and conditions of employment of the employees in the following appropriate unit:

> All production and maintenance employees engaged in the fabrication of metal products employed by Bel-Window, Division of Belknap Glass Company, Seattle, Washington; H & D, Inc., Everett, Washington; and Herzog Aluminum Company, Inc., Woodinville, Washington.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Bargain collectively with Iron Workers Shopmen and Local Union No. 506, affiliated with Bridge, Structural & Ornamental Iron Workers International Union, AFL-CIO, with respect to wages, hours, and

other terms and conditions of employment of the employees in the unit described above.

(b) Post at its Everett, Washington, plant copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed as to Respondent Bel-Window, Division of Belknap Glass Company.

Dated, Washington, D.C. March 13, 1979

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

D—4792

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Iron Workers Shopmen Local Union No. 506, affiliated with Bridge, Structural & Ornamental Iron Workers International Union, AFL-CIO, with respect to wages, hours, and other terms and conditions of employment of the employees in the following appropriate unit:

All production and maintenance employees engaged in the fabrication of metal products employed by Bel-Window, Division of Belknap Glass Company, Seattle, Washington; H & D, Inc., Everett, Washington; and Herzog Aluminum Company, Inc., Woodinville, Washington.

WE WILL NOT withdraw from the multiemployer bargaining unit except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations; or except at such other time we may lawfuly withdraw.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their rights guaranteed them by Section 7 of the Act.

H & D, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building—Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206-442-7472.

JD-(SF)-231-78
Seattle, Wash.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 19-CA-9460

BEL-WINDOW DIVISION
OF BELKNAP GLASS COMPANY

and

Case No. 19-CA-9461

HERZOG ALUMINUM COMPANY, INC.[1]

and

Case No. 19-CA-9462

H & D, INC.

and

IRON WORKERS SHOPMEN LOCAL UNION
No. 506, affiliated with BRIDGE, STRUCTURAL &
ORNAMENTAL IRON WORKERS INTERNATIONAL
UNION, AFL-CIO[2]

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[1] On June 24, 1977, the Regional Director issued the following "Order":

> Having duly considered this matter and deeming that the policies of the National Labor Relations Act have been effectuated . . .
>
> IT IS HEREBY ORDERED that the portions of the consolidated complaint involving Herzog Aluminum Company, Inc., Case No. 19-CA-9461, be and hereby are withdrawn . . . .

[2] On May 20, 1977, the Regional Director issued an order consolidating cases and complaint, and the notice of hearing

David R. Sanders, Esq. for the General Counsel.
Phillip Offenbacker and *Robert Henry, Esqs.*, of *Short, Cressman & Cable*, for the respondent H & D, Inc.
Richard H. Blacklow, Esq., of *Torbenson, Thatcher, McGrath, Treadwell, & Schoonmaker*, for the Respondent Bel-Window Division of Belknap Glass Company.

DECISION

Statement of the Case

INTRODUCTION

HENRY S. SAHM, Administrative Law Judge: This proceeding heard at Seattle, Washington, is based on charges[3] filed by Iron Workers Shipmen Local Union No. 507, affiliated with Bridge, Structural & Ornamental Iron Workers International Union, AFL-CIO, herein called the Union, and a complaint issued by the General Counsel. The complaint alleges in relevant part that the Charging

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which originally included as one of the three Respondents, Herzog Aluminum Company, Inc., in the first complaint dated May 20, 1977. Paragraph 7 of the first complaint originally read: "The last is a series of collective-bargaining agreements between the Union and Respondents covering employees in the unit described in paragraph 6(a) [the alleged appropriate unit]." On May 23, 1977, an "Erratum" was issued whereby the aforementioned paragraph 7 was corrected to read: "The last in a series of collective-bargaining agreements between the Union and Respondents covering employees in the unit described above in paragraph 6, expired on March 31, 1972."

[3] The charges allege in substance that Respondents "unilaterally withdrew from its multiemployer bargaining unit during the course of a lawful economic strike against the members of such multiemployer bargaining unit."

Party Union has been the exclusive collective-bargaining representative for the metal fabricating employees of the two Respondents, Bel-Window Division of Belknap Glass Company and H & D, Inc., for some years past until "the last in a series of contracts expired on March 31, 1977."[4] Specifically, the complaint avers that Respondents attempted to "withdraw" from an arrangement which the General Counsel describes in his complaint as being one whereby "Respondents have, with the assent of the Union, expressed an intention to be bound in collective bargaining with the Union by group action and thereby established a multi-employer bargaining unit."[5] It follows, contends the representative of the General Counsel, that when Respondents Bel-Window and H & D, Inc. "attempted to unilaterally withdraw from the multiemployer group and thereafter refused to bargain with the Union as a member of the multi-employer group, "both Respondents violated Section 8(a)(5) of the National Labor Relations Act.

Although the Regional Director issued an order whereby the allegations and charges against then Respondent Herzog Aluminum Company, Inc., were withdrawn on June 24, 1978, its Answer filed on June 1 should be mentioned in the interests of a full and complete record, and to point out the issues

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[4] "All production and maintenance employees engaged in the fabrication of metal products." Paragraph 6(a) of the complaint.

[5] The General Counsel cites no authority for this rationale and conclusion that "by [this] group action [there was] thereby established a multiemployer bargaining unit," nor has any such authority been found for this conclusion.

involved. Herzog's Answer to the complaint states that "in the past, [it] negotiated jointly" with the other two Respondents, Bel-Window and H & D, Inc., "but signed separate contracts and was bound by that separate contrat . . . To this extent Herzog . . . has been a part of this group. When an impasse in negotiations was reached by April 22, Herzog was willing to proceed to negotiate separately or in any way in which the Union or the other parties would negotiate. To the extent that all three employers were willing to sit down, Herzog was willing to sit down with them. On the other hand, if the other two Respondents were not willing to meet in negotiations, Herzog was still willing to meet and talk with the Union and work out an agreement by which Herzog would be bound. But, due to the activities at H & D, it was clear that Herzog could not control the actions of H & D . . . Prior to April 22, 1977, Herzog did, in negotiations with Local 506, meet with the other Respondents. By April 22, 1977, an impasse in negotiations had been reached; a strike was initiated on April 25 or 26, 1977; H & D's Local 506 employees then returned to work, having repudiated membership in Local 506 [and joined another union shortly thereafter]. Prior to this there had been no reference to there having been a multiemployer unit. Thus at all times Herzog was willing to negotiate toward the end of reaching a collective-bargaining agreement, whether or not there existed any multiemployer unit. Herzog's position on meeting has been clear, no matter what the situation was in regard to the other two Respondents. There was no attempt to withdraw from a multiemployer group because there was either no multiemployer group or Herzog could not force the other Respondents to meet."

Herzog's Answer to the complaint also states that the Union would not bargain with it without the participiation of H & D, Inc. and Bel-Window, taking the position that the Union would not bargain with Herzog alone. Moreover, claims Herzog, it advised Local 506, the Charging Party Union, that it would hire replacements in order for it to remain in operation, which it did ,maintaining, however, that after new employees were hired, it would continue to negotiate for a collective-bargaining agreement with Local 506.

Bel-Window, one of the other two Respondents in this consolidated proceeding, alleges in its Answer that "in the past, it has negotiated jointly" with Herzog and H & D but signed separate contracts and that each Respondent "was bound by that separate contract and that each has been individually represented at the time of collective bargaining." Bel Window's answer continues that it has been a part of this group of three Respondent Companies when an impasse in negotiations was reached by April 22, 1977, at which time Bel-Window was willing to proceed to negotiate separately "or in any way" in which the Union or the other parties would negotiate. To the extent that all three employers were willing to sit down, states Bel, they were willing to negotiate with them. On the other hand, if the other two Respondents, reads Bel's answer, were not willing to meet in negotiations, Bel-Window was still willing to meet and talk with the Union and work out an agreement by which Bel would be bound. "But, due to the activities at H & D, continues Bel, it was clear that Bel could not control the actions of H & D." Furthermore, alleges Bel's answer, "it had other employees doing the same work, but belonging to two other unions; these other employees have had their

own collective-bargaining representatives themselves which include the Teamsters and Local No. 188.

Bel-Window's Answer also states that it, along with the other two Respondents, continued to negotiate with Local 506 of the Iron Workers Union until an impasse was reached on April 22, followed by a strike on April 25 or 26. Bel tried at this point to enlist the assistance of the Federal Mediation and Conciliation Service, according to Bel, but "the Union refused to proceed," resulting in an unfair labor practice charge being filed against Bel by the Union on May 5. H & D's employees who were members of Local 506 returned to work concurrently with the Union having called a strike and with H & D's employees "having repudiated membership" in Local 506. Bel thereupon wrote Local 506's attorneys expressing the thought there was no longer any viable group with whom they could negotiate together. Bel adds that prior to this there had been no reference to there having been a multiemployer unit.

At the same time and in order to try and reach some resolution, declares Bel's Answer, it remained willing to bargain, which it again stated in a May 11 letter to the Union in which Bel wrote it desired to continue bargaining. In this letter, Bel "referred to the unique problem of the H & D situation [its employees resigning from Local 506] which prevented Bel-Window from assuring Local 506 that H & D would attend further meetings and negotiate" as it appeared that after the impasse, the Union insisted it would not bargain with Bel unless the other two Respondents set down also on the employers' side of the table with Bel, as they refused to bargain unless all three employers, comprising what the Union referred to as "the multiemployer group" whom it is alleged "expressed an intention to be bound in collective bargaining with the Union by group action."

On July 29, H & D, Inc., filed its Answer denying any unfair labor practices, stating it employed no members of Local 506 after March 31, 1977, when the aforementioned collective-bargaining agreement expired. H & D declares that the expired contract covered no employees other than those of H & D. Its answer admits that on May 3 it notified the Union of its refusal to participate in a joint proposal to the Union, inasmuch as an impasse existed on April 21, and the Union commenced a strike and established a picket line on April 27. Accordingly, contends H & D, when its employees, members of Local 506, resigned from that Union on March 31, the expiration date of the collective-bargaining agreement and after the commencement of the union strike, when "substantially all of H & D's employees crossed the Union's picket line" and returned to work, its employees were no longer represented by the Union so that it was "justified in not continuing to bargain." H & D also contends that its bargaining with the Union in the past, together with Bel and Herzog "not constitute said Respondents as a multiemployer bargaining group." Moreover, contends H & D, when the three Respondents made a joint offer to the Union following meetings presided over by the Federal Mediation and Conciliation Service, which was rejected by the Union, concludes H & D, the Union no longer represented H & D's employees who had resigned from the Union prior to this time.

Upon the entire record in the case and from the undersigned's observation of the demeanor of the witnesses while testifying, and after due consideration of the briefs filed by the parties, there are hereby made the following:

Findings of Fact

Respondents Bel-Window and H & D are engaged at Seattle and Everett, respectively, both in the State of Washington, in the manufacturing and sale of aluminum windows and doors. The two Respondents annually have combined sales of goods and services in excess of $500,000 and combined purchases of goods and materials in excess of $50,000 which originate from points directly outside the State of Washington and are shipped directly into the State of Washington. Respondents admit the foregoing allegations. Accordingly, it is found that Respondents are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Charging Party, Iron Workers Shopmen Local Union No. 506, affiliated with Bridge, Structural & Ornamental Iron Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

The Background

The Union has never been certified by the Board as the exclusive bargaining representative of Respondents' unit employees described above. The complaint alleges that "Respondents at all times have, with the assent of the Union expressed an intention to be bound in collective bargaining with the Union by group action and thereby established a multiemployer bargaining unit." Thus, it is the General Counsel's theory that a multiemployer unit has existed at all times relevant to this proceeding.

Both Respondent Employers, on the contrary, deny the validity of this assertion, contending the record fails to show by a preponderance of the evidence that the Employers ever evidenced any intention to be

bound as a group in executing identical but separate collective-bargaining agreements with the Union. The testimony shows, contends Bel and H & D, that they had not only never assigned their individual bargaining rights to any multiemployer group but, equally important, it had never, as stated in Section 3(a) of the complaint: "with the assent of the Union, expressed an intention to be bound in collective bargaining with the Union by group action and thereby established a multiemployer bargaining unit . . . ."

The evidence with respect to the history of bargaining is weak, vague, insubstantial and disputable. The General Counsel's principal witness, a union official, only participated in negotiations with Respondents in 1975 and 1977, whereas the vice president of Respondent H & D, Inc., testified on his cross-examination that he did not recall when the Union first represented his employees but it would have to be after 1954. He then opined that the precise date should be known by the Union "when they signed us up . . . ." After further questioning, he apathetically acquiesced with the General Counsel's suggestion that his company had been bargaining with the Union "for somewhere between fifteen and twenty years."

In the 1977 bargaining negotiations, the Union sent to each of the Respondent Companies' negotiators identical proposed collective-bargaining agreements for their consideration. The parties, both Union and Employers, mutually agreed to schedule the first meeting for February 22, 1977.[6] Present were employer representatives of H & D, Inc., Bel-Window and Herzog Aluminum. By order of the Regional

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[6] All dates hereinafter refer to the year 1977 unless otherwise indicated.

Director, the individual charges filed by the Union against Herzog were dismissed on June 24. See footnote 1, *supra*.

Subsequent to this February 22 meeting, there were 11 additional negotiation sessions between union and company representatives. The last one was held 5 months later on August 16, 2 days before the trial began. Some of these bargaining meetings were held at the offices of the Federal Mediation and Conciliation Service.

The Union informed its members, on April 2, 14 and 25, of the contents of the Company's three proposals which the Employers had submitted to the Union on April 2, 14 and 25 during the course of the 12 bargaining sessions. The Respondents' proposed collective-bargaining agreement dated April 2 was rejected by a vote of 68 to 4. The Union then took a strike authorization vote of its members which was approved 40 to 29. Ratification votes of both Employers' subsequently-revised proposals of April 14 and 25 were also taken by the Union of its members. The ratification vote on April 14 was likewise rejected by the employees, 38 to 18. Glidden, the union official, estimated there were only four or five H & D employees present at this April 14 ratification meeting.[7] The last ratification vote held on April 25 of the Employer's additionally-revised offer was also defeated by a vote of 28 to 14. No H & D employees were present at this last meeting.

Just as soon as the defeat of the Employers' April 25 proposal was announced to the members, a

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[7] The record appears to indicate none of H & D's employees appeared after the first ratification vote of April 2, as all of them soon thereafter resigned from Local 506, the Union herein, and joined another union.

motion was made and seconded to go on strike immediately. The vote, according to Glidden, the union official, was "unanimous."

When asked on cross-examination the date picketing started, Glidden answered: "On the twenty-seventh [of April] with the exception of H & D [employees]. . . ." He added that at no time during the strike did H & D employees man the picket lines at the various respondents' plants, including H & D's plant, because these employees had returned to work directly after the Employers' proposal of April 2 was rejected.

On April 1, H & D employees filed a decertification petition with the Board which was withdrawn on April 15. Shortly after the union officials were authorized by the members to call a strike on April 2, 34 of the 44 H & D employees resigned from the union and another employee did so on April 15. By letter dated April 18, 1977, H & D, Inc., by Dalberg, general manager, notified the Union that it understood all of its employees had resigned from the Union and, accordingly, "it is our desire to discontinue multiemployer negotiations at this time," and requesting the Union, if it is in agreement, to notify Dalberg to that effect.

On May 3, the owner of H & D, Inc., notified the Union he wished to bargain separately thereafter, writing:

> I feel that an impasse has been reached in the bargaining and when you have suggested that the Union vote on one of our prior proposals that has already been voted down by the membership. The situation that exists in our plant at the present time leads me to believe that Local #506 has lost most of the membership from H & D,

> Inc. Our people want to work, and do not want to participate in the strikes you have had in the past. I would like to negotiate separately for H & D, Inc. and am ready when you can set up a convenient date for the parties concerned (H & D, Inc. and Local #506). [Signed] Harold I. Dalberg.

Later, the Union wrote to H & D to notify Dalberg that it desired to terminate, at the end of the current contract year, its existing collective-bargaining agreement with H & D, Inc. and asked him when the Company would be prepared to commence negotiations for a new collective-bargaining agreement.

The Union filed charges on May 5 against Bel and Herzog and against H & D on May 9.

On May 4 and 11, Respondent Bel-Window wrote the Union stating that it desired to begin negotiations with the Union, but the Union refused, insisting that all the Employers negotiate as a multiemployer bargaining unit. The letter continues that Herzog and Bel-Window will meet with the Union, but as for H & D, Inc., it "cannot be forced by us to negotiate."

During the course of his cross-examination, Glidden acknowledged that Bel-Window never refused to meet with the Union for the purpose of conducting contract negotiations.[8]

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[8] It appears that counsel for Bel-Window contends its letters of May 4 and 11, *supra*, are the Regional Director's bases for filing its complaint against Bel. The evidence reveals, he argues, that the record, particularly General Counsel's Exhibit No. 12, shows Bel at no time attempted to withdraw from the multiemployer unit. Moreover, he contends, "there [could] be no withdrawal from what does not exist." Furthermore, he states, "*assuming* a multiemployer

Harold Dalberg, vice president and general manager of H & D, Inc., testified that "in prior years" and in "participat[ion]" with Bel-Window, Herzog Aluminum and Fentron Industries, contract negotiations were conducted with the Union. In 1977, Fentron withdrew from this arrangement so that same year Bel, Herzog and H & D participated, but, testified Dalberg, there was not a "formal agreement" among the three companies to bargain collectively on a multiemployer basis. On the contrary, each, testified Dalberg, bargained separately, although they were all present at most of the negotiation sessions, and union correspondence was addressed to each employer individually and not as a group. Moreover, he continued, when collective-bargaining agreements were executed in the past each employer signed identical but individual contracts.

On cross-examination, Dalberg testified that the Union became H & D's employees' representative sometime in 1954 and he has had a "bargaining relationship" with the Union for 15 to 20 years. In later years, Dalberg participated in bargaining with the Union and was joined at various intervals by additional employers, namely, Bel-Window, Darell Window, Fentron Industries and Greenway Aluminum

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unit does exist, there is no evidence Bel ever attempted to withdraw from it. Insofar as an impasse having occurred, Bel alleges it asked the Federal Mediator [sic] Service to intervene but it declined about the first or second week of August." Bel's counsel emphasizes the testimony of Glidden, the union official, who stated that Bel's representatives attended every negotiation meeting, including those of May 16, June 1, 7 and August 16.

Company, which was bought by Herzog Aluminum Company. See pages 5 and 6 above.

Glen Wilbur, a maintenance mechanic employed by Respondent H & D, Inc., since 1957, testified that H & D's unit employees met at various times in 1977 and discussed their resigning from the Charging Party Union, Local 506. Wilbur went to the National Labor Relations Board Regional Office in late March and inquired of a staff member the proper procedure to withdraw from the Union. He testified that it was explained to him at the Regional Office that it was necessary for 51 percent of the unit employees to sign a petition. He also testified that he was informed withdrawing from the Union could not be initiated until the current contract expired on March 31, 1977.

Shortly thereafter, on April 1, 88 percent of H & D's employees voted to resign from the Union, but they agreed that the signed withdrawal forms were not to be filed until the union members' ratification vote was to be held at the union hall. When the Employers' proposed contract was rejected by the members and the Union authorized to call a strike, the H & D employees handed their union officials the following signed withdrawal forms:

> TO: MY EMPLOYER H & D, INC.
>
> Having withdrawn from Shopmen's Local #506 as of April 1, 1977, I hereby revoke my authorization to deduct monthly union dues from my earnings.
>
> Date signed
>
> Employee signature

Shortly thereafter, Wilbur went to the National Labor Relations Board Regional Office again, where an attorney advised him to have the unit employees of not only H & D, Inc., who wished to sign a decertification petition which she gave him, but also the other members of Local 506 who were employed by Herzog Aluminum and Bel-Window to also sign this petition if they so desired.

He later filed the signed petition with the National Labor Relations Board Regional Office, but it appears Wilbur did not request the employees of Herzog and Bel-Window to sign the RD petition which precluded the Regional Office from accepting it; whereupon Wilbur withdrew the decertification petition. He testified that "at that time [he] had [obtained] 100 percent of the signatures from the men of H & D." Wilbur explained that he then went to the Regional Office again and saw the same attorney whom he had consulted on a prior visit, and told him: "She thought that would hold up in any court or anything and she said it was up to me whether I should file another petition after I withdrew mine and I didn't file. I talked to all the fellows down at the shop, and they said, 'Well, we resigned from the Union, we're going to start joining [Local] 188 as soon as they'll take us.' I belong to [Local] 188 right now, along with 20 other fellows down there."

Ken Smith was manager of Bel-Window until June 15, when he retired after being manager of Bel for 14 years. He also represented Bel in the 1977 negotiations with the Union. He testified that neither H & D nor Herzog were authorized to bind Bel-Window in any way during the 6 months of negotiations with the Union in an attempt to reach agreement. He also stated that as of May 4, when the Board served the Union's charge on Bel, none of

Bel's unit employees had resigned from the Union. It was also elicited that as of the same time, Bel requested the Federal Mediation and Conciliation Service to intervene in the matter involving the Union but the commissioner declined. Later, on May 16, the Federal Mediation and Conciliation Service reversed their prior refusal and agreed to attempt to settle the labor dispute. Present when the parties reconvened were representatives of Bel-Window, Herzog Aluminum, Coleman, the Union's International official, and Dalberg "as an observer" who did not participate in the negotiations. The parties discussed on June 1, 7, and August 16, the remaining issue on which agreement had not been reached but to no avail as Herzog Aluminum refused to agree to rehiring the striking employees with retroactive pay. Bel-Window, however, was willing to rehire all its striking employees.

On cross-examination, Counsel for H & D elicited from Smith, Bel-Window's manager, that its employees had resigned from Local 506 on April 1, and, consequently, they "did not have anybody to rehire." Smith also added that the only item on which agreement was not reached was with respect to rehiring the striking employees.

Discussion and Conclusions [9]

Multiemployer bargaining is collective bargaining in which more than one employer or an association of employers participate in common negotiations with a group or groups of unions as distinct from single-employer bargaining. Both multiunion and multiemployer bargaining, as the Supreme Court has ob-

[9] Most of the testimony is uncontradicted.

served, has been widely recognized as an effective way to create stability in collective-bargaining relationships and "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." [10]

The practice first came to the Board's attention in 1938 in representation cases as a problem of defining the unit appropriate for purposes of collective bargaining, and the Board held that it had the authority to find a unit composed of the employees of several competing employers bargaining as a group with the union to be an appropriate one.[11] Recognizing that the foundation of a multiemployer bargaining group is consensual, it follows that once the employer evidences an intention to no longer remain in a collective-bargaining group, he will not be considered a part of the unit.[12] The same rules concerning the right to withdraw apply to both employers and unions alike.[13]

However, an employer's withdrawal must be done at an appropriate time; namely, before bargaining negotiations commence.[14] A caveat to this principle

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[10] *N.L.R.B.* v. *Truck Drivers Local No. 449*, 353 U.S. 87, 95. See also *N.L.R.B.* v. *Brown*, 380 U.S. 284.

[11] *Shipowners Association of the Pacific Coast*, 7 NLRB 1002, 1024-1025.

[12] *Carlton & Co.*, 54 NLRB 222, 228; *Canada Dry Ginger Ale*, 73 NLRB 460, 463; *Milk & Ice Cream Dealers*, 94 NLRB 823, 824.

[13] *The Evening News Assn.* v. *N.L.R.B.*, 372 F.2d 569, 570 (C.A. 6); *Publishers Assn. of New York City*, 364 F.2d 293 (C.A. 2), enforcing 156 NLRB 210, cert. denied 385 U.S. 971.

[14] *Teamsters & Auto Truck Drivers Local No. 70 (Granny Goose Foods)*, 195 NLRB 454.

is that it is permissible for the entity withdrawing to do so, provided "unusual circumstances" exist.[15]

In 1958, in the case of *Retail Associates*,[16] the Board enunciated its approach to the matter of withdrawal of either a union or an employer from a multiemployer unit as follows:

> The right of withdrawal by either a union or an employer from a multi-employer unit has never been held for Board purposes, to be free and uninhibited, or exercisable at will or whim. For the Board to tolerate such inconstancy or uncertainty in the scope of the collective bargaining units would be to neglect its function in delineating appropriate units under Section 9, and to ignore the fundamental purpose of the Act of fostering and maintaining stability in bargaining relationships. Necessarily under the Act, multi-employer bargaining units can be accorded the sanction of the Board only insofar as they rest in principle on a relatively stable foundation. While mutual consent of the union and employers involved is a basic ingredient supporting the appropriateness of a multi-employer bargaining unit, the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multi-employer bargaining unit. Thus, the Board has repeatedly held over the years that the intention by a party to withdraw must be unequivocal, and exercised at an appropriate time,

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[15] *N.L.R.B.* v. *State Electric Service Co.*, 477 F.2d 749, 751 (C.A. 5), cert. den. 84 LRRM 2458.

[16] 120 NLRB 388, 393, 394, 395.

> the decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multi-employer unit and the embracement of a different course of bargaining on an individual employer basis. The element of good faith is a necessary requirement in any such decision to withdraw, because of the unstabilizing and disrupting effect on multi-employer collective bargaining which would result if such withdrawal were permitted to be lightly made.
>
> We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multi-employer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multi-employer negotiations. Where actual bargaining negotiations based on the existing multi-employer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances. [Footnotes omitted.]

Trimmed to its essentials, the *Retail Associates* case holding may be briefly stated as follows: Prior to negotiations, either the union or an employer in a multiemployer bargaining unit may unilaterally withdraw if unequivocal written notice is given which evidences an unambiguous intent to withdraw. During negotiations, however, withdrawal is permissible only upon "mutual consent," or may occur unilaterally in the event of "unusual circumstances."

Respondents in the instant proceeding emphasize their having withdrawn from the negotiations at a time when an "impasse" in bargaining occurred between the Union and both Companies' negotiators.

Thus, they argue, such an impasse excused the two Employers from further bargaining, adding that union consent was not a factor to be considered. Thus, when a genuine impasse is reached, they contend, each of them should be allowed, as a right, to withdraw from such bargaining, and thereafter bargain with the Union on an individual basis.

The Board rule for employer withdrawal from multiemployer bargaining units during negotiations is enunciated in *Hi-Way Billboards, Inc.*, 206 NLRB 22. In that case the Board reaffirmed the "unusual circumstances" requirement of *Retail Associates, supra*, and then stated that even a genuine impasse did not meet this requirement. The Board listed a number of "dire economic consequences" that would meet the "unusual circumstance" requirement, but then emphasized that it could not permit the impasse situation to be so used without undermining the stability of multiemployer units. To do so, it was held, would permit an employer to use an impasse as a pretext for avoiding an impending agreement. In rejecting the argument that an impasse is an unusual circumstance, the Board stated that an impasse is "akin to a hiatus in negotiations" and that its occurrence "cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations . . . ." The Board continued:

> Were we to hold otherwise, we would be denying the practical reality of collective-bargaining negotiations, we would herald the demise of multiemployer bargaining, we would effectively negate the benefits of such bargaining to all parties and to employees, and we would allow an employer to seize upon such an occurrence and use it as a ground for withdrawal merely because it was

> dissatisfied with the impending agreement . . . . Consequently, we hold that it would not effectuate the purpose or policies of the Act to allow an employer member of such an association to withdraw solely on the ground that an impasse in negotiations had been reached.

However, some Federal Courts of Appeals have held to the contrary in those situations where an impasse has occurred. *N.L.R.B.* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (C.A. 5). Such was the case in *N.L.R.B.* v. *Beck Engraving, Co., Inc.*, 522 F.2d 475 (C.A. 3), where the Court held, even though the employer's withdrawal occurred following an impasse, it was justified by "unusual circumstances" as the withdrawal was obviated by the employer's good-faith doubt of the union's majority status among its employees, all of whom had resigned their membership prior to withdrawal. The "impasse" in itself, held the Court, constituted an "unsual circumstance" justifying the employer's withdrawal from a multiemployer unit. The Court did not consider whether the mass resignation of the employees was also an "unusual circumstance." The Court did comment, however, that a situation which could result in an employer being ordered to bargain at a time when none of the employees were members of the charging union would effectively deny the employees the option of being represented by a union or by no union.[17]

An employer violated the Taft-Hartley Act's prohibition against refusing to bargain when it refused to sign a new collective-bargaining contract negotiated by a union and a multiemployer association of

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[17] *Id.* at page 478, footnote 18.

which the employer had been a member for many years, the U.S. Court of Appeals ruled, affirming the Board. The employer's withdrawal from the association, the court notes, occurred after the contract associations had commenced and, therefore, was untimely. The court rejects the employer's contentions that the Board misinterpreted and misapplied the rule limiting the employer's power to withdraw from the multiemployer bargaining association and that, even if its withdrawal was untimely, a later impasse in the multiemployer bargaining, and the union's condonation of the withdrawal, relieved the employer of the consequences of its untimely withdrawal from the multiemployer association. (*Carvel Co.* v. *N.L.R.B.*, —— F.2d — —(C.A. 1), 96 LRRM 2107.)

However, the Board has had occasion, subsequent to the time *Retail Associates* issued, to interpret the phrase "unusual circumstances" in the context of the employer being confronted with a situation of "dire economic circumstances," which the Board defines as circumstances that threaten the very existence of an employer threatened with being forced out of business and closing his plant.[18]

In *U.S. Lingerie Corp.*, 170 NLRB 750, the respondent had been declared a "Debtor in Possession" under the State bankruptcy laws, whereupon it had withdrawn with the intent to relocate and thus avoid a depressed economic area, and had sought help from the union which had been refused. The combination of these factors, with emphasis on respondent's bankrupt situation, led the Board to conclude that unusual circumstances sufficient to excuse the untimely withdrawal existed.

In *Atlas Electrical Service*, 176 NLRB 827, the employer was the only electrical contractor in an

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[18] *Spun Jee Corp.*, 171 NLRB 557.

employer association comprised entirely of construction contractors in other trades. A jurisdictional dispute ensued, in which the employees of respondent informed him that they would quit unless he signed with the International Brotherhood of Electrical Workers, instead of another electricians union with which the employer's association involved was then dealing. The employer requested that the other union furnish him with replacements for his disgruntled employees, but that union refused his request. In these unusual circumstances, the Board held that the employer was entitled to withdraw.

With respect to Respondent's impasse argument being a valid ground for withdrawl from the bargaining unit, it is true that various Courts of Appeal have so held,[19] but the Board has decided otherwise. The undersigned is bound by Board law. This diversity of opinion can only be decided by the Supreme Court.

No case has been found which is clearly dispositive of the "unusual circumstances" present in this proceeding here, but a composite overview of all the cases cited herein leads the trier of these facts to believe and conclude that no unfair labor practice was committed in the case at bar as hereinafter explicated. Some aspects here, it appears, are *sui generis* and indeed bizarre. H & D's peculiar situation, it would appear, not only requires a severing of the Gordian Knot as it would still be faced with a Hobson's choice—a state of choicelessness. In the eyes of the law, this might be considered a novation. *Damnum absque injuria.*

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[19] *N.L.R.B.* v. *Associated Shower Door Co.*, 512 F.2d 330 (C.A. 9); *N.L.R.B.* v. *Beck Engraving Co., Inc., supra; N.L.R.B.* v. *Hi-Way Billboards, Inc., supra*; and *Fairmont Foods Co.* v. *N.L.R.B.*, 471 F.2d 1170 (C.A. 8).

The factual pattern of the "unusual circumstances" facet of this singular case presents an unusual, complex factual pattern and a unique, if not unprecedented legal issue with respect to H & D's employees filing a decertification petition on April 1, and their mass resignation on April 2 from the Union herein, which was followed shortly thereafter by their joining another union. Added to this posture is Respondent H & D being confronted with an "impasse," although this is debatable, even though the parties had been "deadlocked" on monetary proposals since shortly after negotiations for a new contract had begun and still continued as of the date this trial commenced on August 18. See *infra*.

The Union began to picket H & D on April 27. On May 3, the Respondent H & D notified the Union by letter that, inasmuch as negotiations had reached an "impasse," in addition to its employees having resigned from the Union, "it is our desire to discontinue multiemployer negotiations at this time."

So, too, under the unusual circumstances present in this proceeding, it would be a curious paradox to compel H & D to continue bargaining with a union after its employees had not only resigned from said union but had already joined another union, so that if and when a collective-bargaining agreement were executed, it would result in violation of Sections 7 and 9(a) of the Act which guarantees employees freedom of choice as to whether they wish to be represented by a particular union or not represented by any labor organization. Not only would this result be an agregiously anomalous consequence, but it would have the aftereffect of not only nullifying their already-consumated resignations from the Charging Union, but also rescind their choice to remain members of the union which they had already

selected to represent them. Such a mechanistic and academic approach to a real dilemma faced by H & D—not entirely due to its own doing—should not and cannot, in the context of the industrial realities present here, as well as the Act itself, be permitted to override the statutory mandates of Section 7 and 9(a). To hold otherwise would emphasize form and disregard substance. Nor does legalistic hypothesis justify such an attenuated result.

Another legal incidence of this awkward predicament would be to place Respondent H & D in the vulnerable position of being found guilty of committing an unfair labor practice by bargaining with a union, the Charging Party, which no longer represents H & D's employees.[20]

Respondents Bel-Windows and H & D, Inc., also urge that the General Counsel's primary premise that they constitute a multiemployer unit is unsound and contrary to the evidence. They argue that neither of them indicated an intention to be bound as a group in collective-bargaining negotiations but rather to bargain individually.

The burden of proving the commission of unfair labor practices rests at all times upon the General Counsel. The evidence produced by him does not meet the dual requirements of the burden and quantum of proof necessary to establish by a preponderance of the substantial evidence that there existed a multiemployer bargaining unit, as hereinafter delineated.

The Board in *N.L.R.B.* v. *Hi-Way Billboards, Inc., supra,* defines a multiemployer bargaining unit as follows:

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[20] *International Ladies Garment Workers* v. *N.L.R.B.*, 366 U.S. 731.

> As opopsed to other units, a multiemployer unit is a unit based on the consent of the parties, and it is established by an unequivocal agreement by the parties to be bound by group action or by a controlling history of bargaining on such a basis. Once the multiemployer unit is established, the employer members are subject to the rules the Board set forth in *Retail Associates, Inc.*[21]

In applying the teachings of the various Board decisions cited and discussed above to the facts of this proceeding which are detailed *in extenso*, as well as the Board's holdings in cases cited below, it is concluded and found that the Board's definition of a multiemployer bargaining unit is not the same relationship which was established by the Respondents and Union here. It should also be borne in mind that Local 506, the Charging Party Union here had never been certified by the Board as the representative of the unit employees. Nor is there anything in the record to suggest that the employees of H & D, Inc., who subsequently resigned from Local 506, were afforded the opportunity to express whether it was or was not their choice to join a unit comprised of employees of Bel-Window and Herzog Aluminum Company. On the contrary, there is sufficient proof that they did not wish to be included in such a unit, as evidenced by their resigning from Local 506, in order to be represented by another union which they joined shortly after resigning from Local 506.

Here, the facts detailed above reveal that neither Respondent designated or authorized anyone to be their agent or act on their behalf with the Union. Moreover, multiemployer bargaining is consensual

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[21] 120 NLRB 388, 393-395.

in nature. Neither party here gave its assent to such a relationship. Consequently, in the absence of such assent no such relationship can exist. There is no substantial evidence that either Respondent unequivocally intended to be bound by group rather than individual bargaining at any material time herein. Furthermore, the testimony of Smith, manager of Bel-Window, that his company or H & D had no authority to bind each other, stands uncontroverted in the record.

Unlike an orthodox multiemployer unit, here there existed no formal written agreement establishing a multiemployer bargaining group. Nor was there a group name or office, nor a paid professional who after as a joint agent in representing the Employers as their representative in bargaining meetings with the Union. Also, unlike a typical multiemployer bargaining association where negotiations with a union are carried on by the association's negotiating committee comprised of elected individual employers to represent the employer association members, here each employer bargained on an individual basis.

Unlike the two Respondents here, the typical multiemployer bargaining association or group is generally comprised of individual employers located in a defined geographical area who formally grant their bargaining rights to their association officers who, in turn, select or elect the members of their bargaining committee to negotiate with the Union. The members normally obligate themselves to abide by the decisions of their negotiating committee relative to the terms of a new labor collective-bargaining agreement. The Association's working function is to serve as the legal entity in negotiating one contract for their employer-members in the same industry

located in a specific geographical area with its members "bound by irretrievable pledges of solidarity." [22]

The fact that contracts may have been executed prior to 1977 is not an overriding factor to the conclusions reached here, as Glidden, the union official, had no personal knowledge of what negotiations transpired prior to 1977. Nor did any testimony of Dalberg, the owner of H & D, weaken the finding that a multiemployer unit ever existed before, during or after the 1977 negotiating meetings.[23]

Bel-Window, in conjunction with H & D, Inc., and Herzog Aluminum Company, the latter by order of the Regional Director dated June 24, 1978, dismissed all charges against Herzog and permitted it to withdraw as a party respondent. Bel-Window alleges that "in the past, it had negotiated jointly" with the other two Respondents . . . but signed separate contracts" and that each Respondent "was bound by that separate contract and that each has been individually represented at the time of collective bargaining." Aslo alleged by Bel-Window is an "impasse" was reached on April 22, at which time Bel-Window was willing to negotiate separately "or in any way" in which the Union or the other parties would negotiate. All three employers were prepared to negotiate with the Union, but if any one of them should change its mind, Bel-Window informed the Union it was willing to continue negotiations on its own behalf.

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[22] *Retail Clerks Union* v. *N.L.R.B.*, 330 F.2d 210 (C.A.D.C.).

[23] Glidden, Local 506's officials, testifying on direct, does not corroborate this definition of a multiemployer group, as he stated the Employers "caucus[ed]" on each proposal individually at the bargaining sessions as to whether each union proposal was agreeable to all the employers.

Twelve negotiating meetings were held between February 27 and August 16. During the course of these negotiations, the employers submitted three different proposed collective-bargaining agreements to the union negotiators on April 2, 14 and 25, all three of which were defeated when presented to the union members for a ratification vote. After the defeat of the Employers' proposals on April 2, H & D employees resigned from the Union, and on April 27 the employees of Bel-Window and Herzog Aluminum voted to strike, and picketing of all three Employers' plants began on April 27.

On April 18, about a week before picketing commenced, H & D, Inc., notified the Union that it wished to bargain separately. The Company also advised the Union that its employees had not only resigned from the Union, but they did not wish to participate in the strike or to picket, but added that H & D ". . . would like to negotiate separately and am ready when [the Union] can set up a separate date, [H & D] would like to negotiate separately."

By return mail, the Union advised H & D that it desired to terminate its contract on March 31, at the end of the contract year and then begin negotiations for a new collective-bargaining agreement. On May 4 and 11, Bel-Window wrote the Union agreeing to continue negotiations which it did on May 16, June 1, 7 and August 16.

The General Counsel alleges, however, that on May 4, Bel-Window attempted to unilaterally withdraw from the multiemployer group in violation of Section 8(a)(5) of the Act. Bel counters by contending that there never existed a multiemployer bargaining unit of the Respondents; that assuming *arguendo* one did exist, Bel never withdrew and even if it did attempt to withdraw on May 4, it not only

rescinded its attempted withdrawal, but evidenced, by all of its subsequent acts, that it was unequivocally willing to work within the unit.

As discussed above, it is concluded for the reasons there stated that no multiemployer bargaining unit existed as, *inter alia*, there is no probative evidence proving by a preponderance of the substantial testimony and the exhibits herein that any one entity, person or group had authority to speak for or to bind the other employers. Corrobative of this finding is the parties' bargaining history which fails to reveal an "established course of conduct."[24] The 1975 collective-bargaining agreements may have been identical, but belying the contention these were multiemployer bargaining documents is the credited testimony of both Respondents' witnesses that they neither intended to be bound as a group nor considered themselves at any time to be bargaining as a group.[25]

To recapitulate, there was neither an unequivocal manifestation and clear intent to participate and to be bound in the future on the part of H & D, Inc., and Bel-Window, nor an express or implied authority conferred on a joint agent with the requisite power to bind each member of the group.[26]

It will be recalled that the Union filed charges against Respondents on May 5 and 9. The Employers were entitled to a reasonable time in which to further explore the possibility of settling the disputed monetary issues, the only items not resolved as of May 5

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[24] *Komatz Construction Co.* v. *N.L.R.B.*, 458 F.2d 317 (C.A. 8).

[25] *Electrical Theatre, et al.*, 156 NLRB 1351. Cf. *N.L.R.B.* v. *Johnson Sheet Metal Co.*, 442 F.2d 1056 (C.A. 10).

[26] *Tampa Bay Glazing Contractors*, 228 NLRB 360.

and 9, when the Union precipitately filed its charge. This was not a sufficiently reasonable length of time to accord Respondents the opportunity to reach agreement and not be accused in the Union's charge of "refusing to bargain in good faith." It follows that there could be no refusal to bargain if there was no refusal within the meaning of Section 8(d), which defines the good-faith indicia as follows:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . *or any question arising thereunder* . . . . [Emphasis supplied.]

Indeed, based upon what transpired here, it was incumbent on the Union to continue negotiations, which it elected not to do, instead filing an unfair labor practice charge. Filing the charge does not appear to foster the good-faith indicia defined in Section 8(d) of the Act. Moreover, the *bona fides* of the Union, under the circumstances presented here, could best have been tested at that juncture by further affirmative steps by the Union looking toward additional meetings by the parties before the charge was filed, thus precluding and aborting prematurely further negotiations. In the absence of any possibilities to continue negotiations, the onus of which is on the Union, there could be no unfair labor practices committed by Respondents. To hold that Respondents violated Section 8(a)(5) would be, in effect, to not only ignore the Union's conduct (as well as the pardon granted to Herzog Aluminum) but also the Union's conduct in peremptorally causing the premature demise of any possibilities of agreement by choosing to opt for lengthy and costly litigation.

To hold that Respondents violated Section 8(a)(5) would be inequitable in view of Section 8(d) and would penalize Bel-Window and H & D for conduct over which they had no control and which was induced by the Union. "The employer [charged with a Section 8(a)(5) violation] cannot be charged with refusal of that which is not proffered." *N.L.R.B.* v. *Columbian Enamel Co.*, 306 U.S. 292, 298. So too, in this case, the Respondents cannot be charged with refusal of that which was caused by the Union prematurely filing a charge and thus denying them the opportunity to continue to bargain to a probable, if not possible, successful outcome resulting in the execution of a new collective-bargaining agreement.

Based on these indicia and the discussion *supra*, as well as consideration of the Union never having received the imprimatur of Board certification, it is concluded that the General Counsel has failed to establish by a preponderance of the substantial evidence that the relationship of the Respondents was that of a multiemployer bargaining group as defined by Board decisions cited herein.

Noteworthy also is the cogent fact that Bel-Window had requested the Union to agree to enlisting the aid and services of the Federal Mediation and Conciliation Service but the Union declined to do so, which denied Bel-Window the very thing which the General Counsel now alleges to be a violation of Section 8(a)(5).[27]

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[27] Odd, indeed, is the issuance of an Order by the Regional Director on June 24, 1977, dismissing the charges against and directing that Herzog Aluminum be dismissed as a party Respondent in this proceeding, although it was alleged to have committed the same unfair labor practices as H & D and Bel. In fact, the evidence as to Bel and Herzog is practically the same, but H & D's situation is quite different. More-

The burden of proving the commission of unfair labor practices rests at all times upon the Counsel. General Counsel's burden of proof in these cases requires more than raising mere doubts or suspicions as to the Employers' motives and actions. Here General Counsel is unaided by independent evidence of hostility on the part of the Respondents to the Union, or unreasonable proposals that were illegal in their very nature or so indefensible or lacking in rationality as to warrant inferring bad faith. Accordingly, there is found to be both a lack of substantial evidence by the General Counsel's representative and a failure of proof on his part requiring dismissal of the complaint in its entirety.

Based upon the circumstances detailed above (it should be noted that the record herein contains no evidence of animus by Respondents and it was not charged they otherwise violated the Act), the undersigned is convinced that it would not effectuate the policies of the Act to issue an order requiring

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over, if the Union had waived its right to object to withdrawing its charge on the basis of the facts alleged to be unfair labor practices, to any election ordered by the Regional Director, the fact that the charge was filed would not have prohibited such further action and could very well have decided the issues involved in a short period of time rather than resorting to the cumbersome and lengthy litigation of a complaint proceeding. This is perplexing when it is considered that Bel-Window at various times never refused to negotiate but, on the contrary, initiated action requesting the Union to renew negotiations (aborted by the Union filing a charge) in an effort to reach agreement. Herzog, in contrast to H & D and Bel-Window, took no such action looking toward renewed negotiations; yet it was dismissed and ordered that those portions of the complaint involving Herzog "be and hereby are withdrawn."

both Respondents to bargain with the Union.[28] In view of the foregoing conclusions and upon the entire record and totality of events herein, it is found that the evidence warrants no finding that Respondents Bel-Window and H & D, Inc., committed unfair labor practices within the meaning of Section 8(a)(5) of the Act. It will, therefore, be recommended that an order issue dismissing the complaint in its entirety.

Conclusions of Law

1. Respondents are employers within the meaning of Section 2(6) and (7) of the Act.
2. The Union named in the caption is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondents have not engaged in any unfair labor practices in violation of Section 8(a)(5) of the Act inasmuch as the General Counsel has failed to establish by a preponderance of the evidence that Respondents have violated the Act as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, there is hereby issued the following recommended:[29]

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[28] *Kentile, Inc.*, 145 NLRB 135.

[29] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The complaint is dismissed in its entirety.

Dated: October 3, 1978

/s/ Henry S. Sahm
HENRY S. SAHM
Administrative Law Judge

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NO. 80-1498

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

H & D, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an impasse in collective bargaining negotiations justifies an employer's unilateral withdrawal from bargaining.

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STATEMENT OF THE CASE

1. H & D, Inc., is a Washington corporation engaged in the manufacture of aluminum doors and windows. For the time period preceding the dispute which gave rise to this case, the Ironworkers Shopmen Local Union No. 506 served as the collective bargaining representative for about one half of H & D production employees. As a

general practice in prior contract negotiations with the union, H & D would bargain jointly with two other employers, Bel-Window and Herzog Aluminum Co., even though there was no duly organized employer's bargaining unit, nor any formal bargaining agreement.

The negotiations which gave rise to this action began in early 1977 when the union sent out reopening letters and contract proposals to H & D, Bel-Window, and Herzog Aluminum for a contract to succeed the agreement that was to expire later that year. Between the first bargaining session on February 22 and April 20, seven bargaining sessions were held without substantial agreement as to the terms of the new contract. Two employer proposals were decisively rejected by the union members. On April 25, a third employer's proposal was submitted to the union membership for ratification but was

defeated by a vote of 28 to 14. The union then unanimously elected to strike and commenced picketing two days later.

During the negotiations for a new contract, the H & D employee union members met several times to discuss their dissatisfaction with their union representation. When an employer proposal was rejected on April 2, almost all of the H & D employees submitted written resignations from the union and attempted to file a decertification petition with the NLRB. The decertification petition was apparently procedurally defective and was later withdrawn by the employees. None of H & D's employees participated in the strike authorized by the April 25 vote.

On April 18, H & D asked to withdraw from negotiations because of its employees' resignation from the union, but the union would not consent. At the beginning of May, several days after the strike began,

the union proposed resubmitting the contract, rejected by the rank-and-file on April 25, for a vote on May 3. The reconsideration vote was scheduled but then cancelled. The general manager of H & D notified the union by a letter dated May 3 that a bargaining impasse had been reached when the union suggested a second vote on a prior proposal which had been turned down by the membership, and because of the impasse they were withdrawing from the contract negotiations.

2. The union subsequently filed charges against H & D for refusing to bargain as part of the multiemployer group, and a hearing was had before the administrative law judge on August 18, 1977. The administrative law judge found that H & D had not committed an unfair labor practice by withdrawing from the joint negotiations because there was no multiemployer bargaining unit as defined by the National Labor

Relations Board decision. Finding of Fact and Conclusions of Law of Administrative Law Judge Sahm, October 3, 1978. Petitioner's App. C, 50a. The administrative law judge did not make a finding concerning an impasse in negotiation because of the NLRB's decision in NLRB v. Hi-Way Billboard, Inc., 206 N.L.R.B. 22 (1973), enforcement denied, 500 F.2d 181 (5th Cir. 1974) where the Board indicated that even a genuine impasse did not create an "unusual circumstance" allowing the unilateral withdrawal of an employer from bargaining. Nor did the administrative law judge address H & D's contention that tne en masse resignation of its employees from the union created an "unusual circumstance" justifying withdrawal from negotiations. 3. On review before the NLRB the Board rejected the administrative law judge's conclusion that there was no multiemployer

bargaining unit at the time of H & D's withdrawal, but instead found that based on the controlling history of the collective bargaining an employer bargaining unit did exist. Addressing the contention that the bargaining impasse created an "unusual circumstance" justifying H & D's withdrawal, the Board summarily concluded "that the evidence does not establish that an impasse existed. . . ." H & D, Inc., 240 N.L.R.B. No. 161, p. 3 (1979). Finally, the Board concluded that the resignation of H & D's employees from the union did not create an "unusual circumstance" allowing its withdrawal. The Board ordered H & D to bargain with the Union as representatives of its employees in the established multiemployer unit. Petitioner's App. C, 11a-18a.

4. The court of appeals found that a bargaining impasse did exist at the time of H & D's withdrawal. The court held that an

impasse is an "unusual circumstance" that justifies an employer's otherwise untimely withdrawal, and accordingly denied enforcement of the Board's order. Petitioner's App. A, 6a-9a. The court did not find it necessary to reach the question of whether a multiemployer bargaining unit existed or whether the en masse resignation of H & D's employees from the union was an "unusual circumstance" permitting employer withdrawal. Petitioner's App. A, 9a.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should not be granted in this case because there is not a genuine conflict among the federal courts of appeals decisions regarding whether an impasse in collective bargaining negotiations justifies an employer's unilateral withdrawal from bargaining.

ARGUMENT

A review on certiorari "is not a matter of right, but of judicial discretion", and "will be granted only when there are special and important reasons". R. 17.1. Differences among federal courts of appeals will not likely be accepted as a sufficient conflict to warrant the granting of a petition for a writ of certiorari "if they can fairly be accounted for on the basis of variations in the factual situation among the cases involved". Harlan, Manning The Dikes (1958) 13 Record NYCBA 541, 552.

The petitioner cites two court of appeals decisions which hold that the occurrence of an impasse in the course of collective bargaining does not enable an employer unilaterally to withdraw from bargaining, N.L.R.B. v. Charles D. Bonanno Linen Service, Inc., 243 N.L.R.B.

No. 140, enforced, 630 F.2d 25 (1st Cir. 1980), petition for cert. pending, No. 80-931, and N.L.R.B. v. Marine Machine Works, 635 F.2d 522 (5th Cir. 1981). Both of those cases are factually different from the case involved in this petition.

First, in both of these cases cited by the petitioner, the employer was a member of a multiemployer group. The court of appeals in this case did not decide whether or not H & D was a member of such a group. Petitioner's App. A, 9a. Such a distinction would make a difference as to whether an impasse would justify unilateral employer withdrawal from bargaining. If H & D was not a member of a multiemployer group, its actions in withdrawing would not affect the negotiations of any other employer in the group or the ultimate acceptability of any agreement reached by the employers who continued to bargain, as was the case in Charles D. Bonanno, supra.

The second factual difference is that, in both of these cases cited by the petitioner, the court is careful to note that, after the bargaining impasse had been reached, no interim agreement was reached between the union and any employer nor was any such arrangement seriously attempted. In the present case, the employees of H & D evidenced their intent to reach an agreement by their unsuccessful attempt to resign from the union and file a decertification petition. The importance of this factual difference is explained in several cases. Allowing the union to reach interim agreements with individual employers in a multiemployer bargaining unit, and not allowing the other employers to withdraw from bargaining when an impasse had been reached, leaves the members of the multiemployer group without interim agreements watching "certain of their withdrawing competitors resume business while they

themselves were still in the throes of an economic strike." NLRB v. Independent Ass'n of Steel Fabricators, Inc., 582 F.2d 135, 147 (2d Cir. 1978). See also, NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181 (5th Cir. 1974); NLRB v. Associated Shower Door Co., ,512 F.2d 230 (9th Cir.), cert. denied, 423 U.S. 893, 96 S. Ct. 191, 46 L. Ed. 2d 125 (1975). The court in NLRB v. Beck Engraving Co., 522 F.2d 475, 483 (3d Cir. 1975) stated the problem as follows:

> The union . . . should not have been given two weapons for its economic arsenal (i.e. the selective strike and individual negotiations) while the employers are given only one (viz., the lockout).

To correct this imbalance, the courts have allowed the employers to have the ability to withdraw from bargaining upon impasse. Authorized Air Conditioning Co. v. NLRB, 606 F.2d 899 (9th Cir.), cert. denied, 455 U.S. 950, 100 S. Ct. 1598, 63 L. Ed. 2d

785 (1980); Fairmont Foods Co. v. NLRB, 471 F.2d 1170 (8th Cir. 1972); Jaime Andino d/b/a Jamie Andino Trucking, 619 F.2d 147 (1st Cir. 1980); NLRB v. Acme Wire Works, Inc., 582 F.2d 158 (2d Cir. 1978).

With the distinguishable exceptions of Charles D. Bonanno, supra, and Marine Machine Works, supra, all of the other cases cited by the petitioner in their petition, and all the cases found by the respondent in the course of research, hold that the occurrence of a genuine impasse does justify an employer's unilateral withdrawal from bargaining. Two of the above cited cases, NLRB V. Associated Shower Door Co., and Authorized Air Conditioning Co., are both Ninth Circuit decisions and a writ of certiorari was denied in both cases, in one case in 1980.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

SHORT & CRESSMAN
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